

AMENDED IN ASSEMBLY JUNE 11, 2009

AMENDED IN SENATE APRIL 13, 2009

**SENATE BILL**

**No. 448**

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**Introduced by Senator Pavley**

February 26, 2009

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An act to add Article 3.7 (commencing with Section 2089.2) to Chapter 1.5 of Division 3 of the Fish and Game Code, relating to fish and wildlife.

LEGISLATIVE COUNSEL'S DIGEST

SB 448, as amended, Pavley. California State Safe Harbor Agreement Program Act.

Existing law establishes various programs designed to conserve and protect endangered species and wildlife.

*Existing law, the California Endangered Species Act (CESA), prohibits a person from importing, exporting, or taking, possessing, purchasing, or selling within the state, any species, or any part or product thereof, that the Fish and Game Commission determines to be an endangered species or a threatened species, with specified exceptions.*

This bill would enact the California State Safe Harbor Agreement Program Act (*act*), which would establish a program to encourage landowners to manage their lands voluntarily, by means of state safe harbor agreements approved by the Department of Fish and Game, to benefit endangered, threatened, or candidate species without being subject to additional regulatory restrictions as a result of their conservation efforts.

*The bill would authorize the department to authorize specified acts that are otherwise prohibited pursuant to the CESA pursuant to a safe harbor agreement entered into under the act.*

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Article 3.7 (commencing with Section 2089.2)  
is added to Chapter 1.5 of Division 3 of the Fish and Game Code,  
to read:

Article 3.7. California State Safe Harbor Agreement Program  
Act

2089.2. (a) This article shall be known and may be cited as  
the California State Safe Harbor Agreement Program Act.

(b) The Legislature finds that a key to the goals set forth in this  
article of conserving, protecting, restoring, and enhancing  
endangered, threatened, and candidate species, is their habitat. A  
significant portion of the state's current and potential habitat for  
these species exists on property owned by private citizens,  
municipalities, tribes, and other nonfederal entities. Conservation  
efforts on these lands and waters are critical to help these declining  
species. Using a collaborative stewardship approach to these lands  
and waters will help ensure the success of these efforts.

(c) The purpose of this article is to establish a program that will  
encourage landowners to manage their lands voluntarily to benefit  
endangered, threatened, or candidate species and not be subject to  
additional regulatory restrictions as a result of their conservation  
efforts.

(d) This article does not relieve landowners of any legal  
obligation with respect to endangered, threatened, or candidate  
species existing on their land. The program established by this  
article is designed to increase species populations, create new  
habitats, and to enhance existing habitats. Although this increase  
may be temporary or long-term, California state safe harbor  
agreements shall not reduce the existing ~~number of~~ *populations*  
species present at the time the baseline is established by the  
department.

2089.4. As used in this article, the following definitions apply:

(a) "Agreement" means a state safe harbor agreement approved  
by the department pursuant to this article. "Agreement" includes

1 *an agreement with an individual landowner and a programmatic*  
2 *agreement.*

3 (b) “Baseline conditions” means the existing estimated  
4 population size ~~and, the extent and quality of habitat, or both~~  
5 ~~population size and the extent and quality of habitat~~, for the species  
6 on the land to be enrolled in the agreement that sustain seasonal  
7 or permanent use by the covered species. Baseline conditions shall  
8 be determined by the department, in consultation with the applicant  
9 ~~and shall be at least the estimated population size and extent and~~  
10 ~~quality of habitat for the covered species at the time when the~~  
11 ~~agreement is executed. Baseline conditions shall be established or~~  
12 ~~approved by the department, and shall be based on the best~~  
13 ~~available science and~~ objective scientific methodologies. For  
14 purposes of establishing baseline conditions, a *qualified* person  
15 that is not employed by the department may conduct habitat  
16 surveys, if that person ~~is qualified~~, has appropriate species  
17 expertise; and has been approved by the department.

18 (c) “Department” means the Department of Fish and Game,  
19 acting through its director or his or her designee.

20 (d) “Landowner” means any *person or* nonstate or federal entity  
21 or entities that lawfully hold any interest in land or water to which  
22 they are committing to implement the requirements of this article.

23 (e) “Management actions” means activities on the enrolled land  
24 or water that are reasonably expected by the department to provide  
25 a net benefit to the species or their habitat, or both.

26 (f) “Monitoring program” means a program established or  
27 approved by the department in accordance with subdivision (f) of  
28 Section 2089.6.

29 (g) “Net conservation benefit” means the cumulative benefits  
30 of the management activities identified in the agreement that  
31 provide for an increase in a species’ population or the enhancement,  
32 restoration, or maintenance of covered species’ suitable habitats  
33 within the enrolled property. Net conservation benefit shall take  
34 into account the length of the agreement, any offsetting adverse  
35 effects attributable to the incidental taking allowed by the  
36 agreement, and other mutually agreed upon factors ~~such as floods,~~  
37 ~~unplanned fires, and catastrophic events.~~ Net conservation benefits  
38 shall be sufficient to contribute either directly or indirectly to the  
39 recovery of the covered species. These benefits include, but are  
40 not limited to, reducing fragmentation and increasing the

1 connectivity of habitats, maintaining or increasing populations,  
2 enhancing and restoring habitats, and buffering protected areas.

3 (h) “*Programmatic agreement*” means a state safe harbor  
4 agreement issued to a governmental or nongovernmental program  
5 administrator. The program administrator for a programmatic  
6 agreement shall work with landowners and the department to  
7 implement the agreement and shall be responsible for ensuring  
8 compliance with the terms of the agreement.

9 (i) “*Qualified person*” means a person with species expertise  
10 who has been approved by the department.

11 ~~(h)~~

12 (j) “Return to baseline” means, at the termination of an  
13 agreement, activities undertaken by the landowner to return the  
14 species population or ~~aeres~~ extent or quality of habitat to baseline,  
15 excluding catastrophic events such as floods, unplanned fires, or  
16 earthquakes, and other factors mutually agreed upon prior to permit  
17 issuance and that are beyond the control of the landowner.

18 2089.6. In addition to the other provisions of this article, the  
19 department may authorize acts that are otherwise prohibited  
20 pursuant to Section 2080 through an agreement, *including a*  
21 *programmatic agreement*, if all the following conditions are met:

22 (a) The department receives a complete application containing  
23 all of the information described in Section 2089.8.

24 (b) The take is incidental to an otherwise lawful activity.

25 (c) The department finds that the implementation of the  
26 agreement is reasonably expected to provide a net conservation  
27 benefit to the species listed in the application. This finding shall  
28 be based, at a minimum, upon the determination that the agreement  
29 is of sufficient duration and has appropriate assurances to realize  
30 these benefits.

31 (d) The take authorized by the agreement will not jeopardize  
32 the continued existence of the species. This determination shall  
33 be made based on the provisions of subdivision (c) of Section  
34 2081.

35 (e) The department finds that the landowner has agreed, to the  
36 maximum extent practicable, to avoid or minimize any incidental  
37 take authorized in the agreement, including returning to baseline.

38 (f) The department has established or approved a monitoring  
39 program, based upon objective scientific methodologies, to provide  
40 information for the department to evaluate the effectiveness and

1 efficiency of the agreement program, including whether the net  
2 conservation benefits set forth in the agreement are being achieved  
3 and whether the participating landowner is implementing the  
4 provisions of the agreement.

5 (g) The department has determined that *there is* sufficient  
6 ~~funding is ensured~~, for it or its contractors or agents, to determine  
7 baseline conditions on the property, for the landowner to carry out  
8 management actions, and for monitoring for the duration of the  
9 agreement.

10 (h) Implementation of the agreement will not be in conflict with  
11 any existing department-approved conservation or recovery  
12 programs for the species covered by the agreement.

13 2089.8. The landowner shall submit all of the following:

14 (a) A detailed map depicting the land proposed to be enrolled  
15 in the agreement.

16 (b) The common and scientific names of the species for which  
17 the landowner requests incidental take authorization.

18 (c) A detailed description of the *landowner's* current land and  
19 ~~water uses for the geographic area~~ *management practices that*  
20 *affect the habitat of the covered species* for which the landowner  
21 requests incidental take authorization.

22 (d) A detailed description of the *landowner's* future uses of land  
23 ~~or water for the geographic area~~ *management practices that affect*  
24 *the habitat of the covered species* for which the landowner requests  
25 incidental take authorization. This description shall be used only  
26 for informational and planning purposes.

27 (e) The proposed duration of the agreement that is sufficient to  
28 provide a net conservation benefit to the species covered in the  
29 permit and an explanation of the basis for this conclusion.

30 (f) A detailed description of the proposed management actions  
31 and the timeframe for implementing them.

32 (g) A description of the possible incidental take that may be  
33 caused by the management actions and of the anticipated species  
34 populations and habitat changes over the duration of the permit.

35 (h) A detailed description of the proposed monitoring program.

36 2089.10. If an agreement has been approved and the department  
37 finds that the agreement is being properly implemented, the  
38 department shall allow the landowner to alter or modify the  
39 enrolled property, even if that alteration or modification will result

1 in the incidental take of a listed species, to the extent that the  
2 alteration or modification returns the species to baseline conditions.

3 2089.12. (a) Unless the department determines that it is  
4 inappropriate to do so based on the nature of the management  
5 actions being proposed, the species listed in the permit, or other  
6 factors, the agreement shall require that the landowner provide the  
7 department with at least 60 days advance notice of any of the  
8 following:

9 (1) Any incidental take that is anticipated to occur under the  
10 agreement.

11 (2) The landowner's plan to return to baseline at the end of the  
12 agreement.

13 (3) Any plan to transfer or alienate the landowner's interest in  
14 the land or water.

15 (b) (1) If the department receives any notice described in ~~this~~  
16 ~~section~~ *subdivision (a)*, the landowner shall provide the department,  
17 its contractors, or agents with access to the land or water for  
18 purposes of safely removing or salvaging the species.

19 (2) The department shall provide notice to the landowner at  
20 least seven days prior to accessing the land or water for the  
21 purposes of paragraph (1). The notice shall identify ~~the persons~~  
22 *each person* selected by the department, its contractors, or agents  
23 to access the land or water.

24 (3) Notwithstanding paragraph (1), during the seven-day *notice*  
25 period, a landowner may object, in writing, to ~~the a~~ person selected  
26 to access the land or water. If a landowner objects, another person  
27 shall be selected by the department, its contractors, or agents, and  
28 notification shall be provided to the landowner pursuant to  
29 paragraph (2). However, if a landowner objects to ~~the a~~ selection  
30 ~~on three~~ *two* successive occasions, the landowner shall be deemed  
31 to consent to access to the land or water by a person selected by  
32 the department, its contractors, or agents. Failure by a landowner  
33 to object to the selection within the seven-day period shall be  
34 deemed consent to access ~~the a~~ land or water by the person selected  
35 by the department, its contractors, or agents.

36 2089.14. An agreement may be amended with the mutual  
37 consent of the landowner and the department.

38 2089.16. If a landowner seeks to sell, transfer, or otherwise  
39 alienate the land or water enrolled in the agreement during the  
40 term of the agreement, the person or entity assuming that interest

1 in the property shall (a) assume the existing landowner's duties  
2 under the agreement, (b) enter into a new agreement with the  
3 department, or (c) withdraw from an existing agreement under the  
4 terms provided in the agreement, as approved by the department.

5 2089.18. The suspension and revocation of the agreement shall  
6 be governed *by* suspension and revocation regulations adopted by  
7 the department.

8 2089.20. (a) This section does not provide the public a right  
9 of entry onto the enrolled land or water. The landowner shall  
10 provide the department, its contractors, or agents with access to  
11 the land or water proposed to be enrolled in the agreement to  
12 develop the agreement, determine the baseline conditions, monitor  
13 the effectiveness of management actions, or safely remove or  
14 salvage species proposed to be taken.

15 (b) The department shall provide notice to the landowner at  
16 least seven days before accessing the land or water for the purposes  
17 of subdivision (a). The notice shall identify ~~the persons~~ *each person*  
18 selected by the department, its contractors, or agents to access the  
19 land or water.

20 (c) Notwithstanding subdivision (a), during the seven-day *notice*  
21 period, a landowner may object, in writing, to ~~the a~~ person selected  
22 to access the land or water. If a landowner objects, another person  
23 shall be selected by the department, its contractors, or agents, and  
24 notification shall be provided to the landowner pursuant to  
25 subdivision (b). However, if a landowner objects to ~~the a~~ selection  
26 on ~~three~~ *two* successive occasions, the landowner shall be deemed  
27 to consent to access to the land or water by a person selected by  
28 the department, its contractors, or agents. Failure by a landowner  
29 to object to the selection within the seven-day period shall be  
30 deemed consent to access the land or water by ~~the a~~ person selected  
31 by the department, its contractors, or agents.

32 2089.22. (a) If a federal safe harbor agreement has been  
33 approved pursuant to applicable provisions of federal law and the  
34 federal safe harbor agreement contains species that are endangered,  
35 threatened, or are candidate species pursuant to this chapter, no  
36 further authorization or approval is necessary under this article for  
37 ~~that person~~ *any person authorized by that agreement* to take the  
38 species identified in and in accordance with the federal Safe Harbor  
39 Agreement, if that person and the department follow all of the  
40 procedures specified in Section 2080.1, except that the

determination of consistency shall be made by the department based only on the issuance criteria contained in this article.

(b) The department may adopt nonregulatory guidelines to clarify how the provisions of this chapter may be used in connection with voluntary local programs for routine and ongoing agricultural activities adopted pursuant to Article 3.5 (commencing with Section 2086) and natural community conservation plans adopted pursuant to Chapter 10 (commencing with Section 2800).

2089.23. (a) *A landowner that owns land that abuts a property enrolled in a state safe harbor agreement shall not be required, for purposes of an incidental take permit, to undertake the management activities set forth in the state safe harbor agreement, if all of the following conditions are met:*

(1) *The neighboring landowner allows the department to determine baseline conditions on the property.*

(2) *The neighboring landowner agrees to maintain the baseline conditions for the duration specified in the safe harbor agreement.*

(3) *The department determines that allowing the neighboring landowner to receive an incidental take permit for the abutting property does not undermine the net conservation benefit determination made by the department in the approval of the safe harbor agreement.*

(4) *The take authorized by the department will not jeopardize the continued existence of the species. This determination shall be made in accordance with subdivision (c) of Section 2081.*

(b) (1) *Unless the department determines that it is inappropriate to do so based on the species listed in the permit, or any other factors, the neighboring landowner shall provide the department with at least 60 days advance notice of any of the following:*

(A) *Any incidental take that is anticipated to occur under the permit.*

(B) *The neighboring landowner's plan to return to baseline conditions.*

(C) *Any plan to transfer or alienate the neighboring landowner's interest in the land or water.*

(2) (A) *If the department receives any notice described in paragraph (1), the neighboring landowner shall provide the department, its contractors, or agents with access to the land or water for purposes of safely removing or salvaging the species.*



1     (B) The department shall provide notice to the neighboring  
2     landowner at least seven days before accessing the land or water  
3     for the purposes of subparagraph (A). The notice shall identify  
4     each person selected by the department, its contractors, or agents  
5     to access the land or water.

6     (C) Notwithstanding subparagraph (B), during the seven-day  
7     notice period, the neighboring landowner may object, in writing,  
8     to a person selected to access the land or water. If the neighboring  
9     landowner objects, another person shall be selected by the  
10    department, its contractors, or agents, and notification shall be  
11    provided to the neighboring landowner pursuant to subparagraph  
12    (B). However, if the neighboring landowner objects to a selection  
13    on two successive occasions, the neighboring landowner shall be  
14    deemed to consent to access to the land or water by a person  
15    selected by the department, its contractors, or agents. Failure by  
16    the neighboring landowner to object to the selection within the  
17    seven-day notice period shall be deemed consent to access the  
18    land or water by the person selected by the department, its  
19    contractors, or agents.

20    2089.24. The department may promulgate regulations to  
21    implement this article.